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No. 89-1971

In The

Supreme Court of the United States

October Term, 1990

JAMES GUY GISH, JAMES MICHAEL WAGGONER, and DANIEL R. MARTIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN C. HUMPAGE
1208 SW Tyler
Topeka, Kansas 66612
Phone: (913) 235-5351

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a due process violation has occurred by the Tenth Circuit's Opinion finding that the Petitioners under Rule 104(c) of the Federal Rules of Evidence, had waived their right to participate in a hearing in the existence of the conspiracy pled, though requested *ab initio*.

2. Whether the provisions of 21 U.S.C. § 846 still requires an agreement between two or more persons to violate the Federal narcotics laws.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners James Guy Gish, James Michael Waggoner, and Daniel R. Martin, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on February 28, 1990.

OPINION BELOW

The Opinion of the Court of Appeals for the Tenth Circuit has not been published pursuant to the Tenth Circuit's Rule 36.3; however, it is appended hereto. (A. 1a-12a) There is one relevant written Opinion of the Trial Court which is appended hereto. The Trial Court's oral Orders and rulings on the issues in which review is sought is further appended hereto.

JURISDICTION

The judgment of the Court of Appeals of the Tenth Circuit was entered on February 28, 1990. The Court on March 19, 1990, extended the time for filing the Petitioners' Petition for Rehearing to April 13, 1990. The Petitioners' Petition for Rehearing *En Banc* was denied on May 3, 1990, (A. 13a-14a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 21:

§ 841(a)(1):

UNLAWFUL ACTS

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;"

United States Code, Title 21:

§ 846 – Attempt and conspiracy:

"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

United States Code, Title 18:

§ 2 – Principals:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Rule 103 – Rulings on Evidence:

"(c) *Hearing of jury*. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Plain error*. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

Rule 104 – Preliminary Questions:

"(c) *Hearing of jury*. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings

on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests."

Rule 801 – Definition (d)(2)(E):

"(d) *Statements which are not hearsay.* A statement is not hearsay if –

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT OF THE CASE

The Petitioners were convicted by a jury verdict finding the Petitioners James Guy Gish, James Michael Waggoner and Daniel R. Martin guilty of the offense of conspiring to possess, with intent to distribute, 500 pounds of marijuana, a controlled substance, in violation of Title 21, United States Code §§ 846, 841(a)(1) and Title 18 United States Code, § 2.

The Co-defendant, Thomas Joel Evans, was also charged in a second count with the unlawful, willful and intentional use of a communication facility, a telephone, and committing, causing and facilitating the commission of an act or acts constituting a felony under the provisions of Subchapter I, Chapter 13 of Title 21 of the United States Code, to-wit: conspiracy to possess with intent to distribute marijuana, a controlled substance, all in violation of Title 21, United States Code, § 843(b), and was found guilty on both Counts.

The Government's case was prefaced on the use of a confidential informant to arrange the introduction and

meetings of Government law enforcement agents with persons who might be interested in the purchase of marijuana. The Government's evidence dealt, for the most part, with meetings between the informant, DEA agents and the Defendant Evans, who was the Government's unwitting soliciting agent.

These Petitioners sought, by Motion, to obtain a pretrial hearing to have the opportunity to testify as contemplated by Rule 104 F.R.E., in opposition to the admissibility of statements made by an alleged co-conspirator and to have the Court determine whether the Government's evidence establishes the existence of a conspiracy and that such statement was made as a part and in furtherance of the conspiracy thereof before any reference was made in the presence of the jury. In denying the Motion the Trial Court stated:

> "THE COURT: From what I understand, the case is not overly complex and we have studied most of the Affidavits which were filed for the warrants and it does not seem to be a very complex case. As of now I am going to overrule and deny the Motion, and we will look at it further to see what it might do in your particular situation. Mr. Ambrosio, here I'm not sure how they might come into it." (R. Doc., No. 128, p. 18)

During the trial the Government offered Exhibit 2, a transcript of Exhibit 1, being a recording of conversations occurring on April 13, 1988, in Manhattan, Kansas, being one of the alleged conspiratorial meetings. Present at this meeting were Government agents, Defendant Evans, and a confidential informant. (R. Doc. No. 129, p. 125)

Following the presentation of Exhibits 1 and 2 to the jury, the Government established that the next contact, April 19, 1988, was with Defendant Evans, (R. Doc. 129, pp. 129-130), which was by telephone, the purpose of which was to set up a meeting in Manhattan on April 20, 1988. This meeting occurred, and present were Government agents and Defendant Evans. (R. Doc., No. 129, pp. 130-131) The Defendants Gish and Martin, appeared at that meeting somewhat after it commenced and after some small talk the parties went to another motel at which meeting the Government's agents showed Defendant Martin and Defendant Evans a brick of marijuana. (R. Doc. No. 129, p. 134) No evidence was presented that the marijuana was displayed to the Defendant Gish and it is clear that the Defendant Waggoner was not present. (R. Doc. No. 129, pp. 134-135)

The only contacts by Government agents between April 20 and May 5 was with the Defendant Evans. (R. Doc., No. 129, p. 146)

The agents met Defendant Evans, and Defendants Gish and Waggoner at Bennigans Restaurant in Topeka. This was the first appearance of the Defendant Waggoner in any of the events about which the Government offered evidence. At Bennigans the Government engaged in small talk with Evans, but had no conversation with Gish or Waggoner. (R. Doc. No. 129, pp. 155-156)

The Government's agents acknowledged that all phone conversations were between the agents and Evans, that there was no evidence of conversation between Evans and the other Defendants and that Evans was

possibly "puffing" or talking a better game than he could play. (R. Doc. No. 129, pp. 160-162)

The Government's agents further acknowledged that "Dan" and the person in Lawrence who was supposedly the "money man" did not know each other, (R. Doc. No. 129, p. 163), and further acknowledged that the transaction was conditioned by Mr. Evans on being able to get money from people in Texas and California. (R. Doc. No. 129, pp. 165-166)

Throughout cross-examination of the Government's agent, (Robert Benton), it was acknowledged that no agreement could be arrived at unless and until an unidentified resident of Lawrence was satisfied. (R. Doc. No. 130, pp. 222-225)

The agent (Benton) acknowledged that the man in Lawrence did not know Dan [Martin] and that it was a fair assumption that there was no connection between the man in Lawrence and the Defendant Martin, (R. Doc. No. 130, pp. 227-228), and that they "do business with two completely different clientele". (R. Doc. No. 130, p. 228)

Agent Benton further acknowledged that at the April 20 meeting in the Manhattan hotel room, the Defendant Martin advised that he did not have the kind of money that the agents were talking about, that he would leave to make a telephone call and would contact them back in thirty (30) minutes, but the agents never heard from him again. (R. Doc. 130, pp. 234-238) Further, that there were two people named "Dan" [Hackler and Martin] and that the reports of the agents did not distinguish between the two when the name "Dan" was used. (R. Doc. No. 130, pp. 238-239)

On redirect examination, Agent Benton acknowledged that there were no telephone records reflecting any calls made by the Defendant Waggoner or the Defendant Martin to any other defendant, (R. Doc. No. 130, p. 250), but Exhibit 18 showed calls from the Defendant Evans to the Defendant Gish and Exhibit 19 showed telephone calls from the Defendant Gish to the Defendants Martin, Waggoner and Defendant Evans and Evans' place of employment. (R. Doc. No. 130, pp. 253-254)

Agent James Woods acknowledged that the confidential informant and the Defendant Evans were "dealing over three pounds of marijuana", an apparent transaction outside of those here allegedly involved. (R. Doc. No. 130, p. 263)

Agent Benton acknowledged that in neither the Manhattan meeting nor the meeting at Bennigans in Topeka did the agents ~~ever ha~~ve the marijuana which they were proposing to transfer. The agent further acknowledged that no negotiations occurred at Bennigans, the sole purpose of the meeting at Bennigans was for "show and tell", that is solely to determine if any of the Defendants had the financial ability to negotiate a purchase of 500 or 750 pounds of marijuana.

REASONS FOR GRANTING THE WRIT

1. **The Tenth Circuit Court of Appeals, in Upholding the Petitioners' Convictions Found that the Petitioners had not Requested, Until the Trial Court's Finding by a Preponderance of the Evidence that a Conspiracy Existed and that the Petitioners were Members of the Conspiracy, for a Hearing Pursuant to Rule 103 and 104 to Allow the Petitioners to Testify Out of the Presence of the Jury on this Issue, the Court Further Finding that the Issue had been Waived.**

The Court's Opinion of February 28, 1990, proves of great concern to the Petitioners' counsel in two (2) areas, the primary concerns are the Petitioners' efforts expended in seeking a pretrial determination of the existence of the conspiracy pled out of the presence of the jury, as the Petitioners advised the Trial Court that they desired to testify in relation thereto pursuant to Rules 104(c)(d) and 103(c)(d) F.R.E. which is addressed in the Court's Opinion at (A. 6a-10a). The Court's Opinion did not reflect that the Petitioners' efforts were bifurcated in that the pretrial hearing sought was to allow for the "preferred order of proof" and to further allow for the Petitioners to testify out of the presence of the jury in relation thereto, which ultimately was acknowledged by the Trial Court on December 22, 1988, at the hearing the Court afforded the Petitioners on their post-trial Motions.

The pretrial determination sought herein was bifurcated in that it sought a determination of the existence of the conspiracy and was further sought to allow the Petitioners to testify in relation thereto out of the presence of the jury pursuant to Rule 104(c) F.R.E.

The Court's Opinion at (A. 6a-8a) made the following findings:

> "At no time did any defense counsel suggest that his client wanted to take the stand to testify, or that any defendant believed himself torn between the need to testify about the existence of a conspiracy and his right not to incriminate himself."

The Court further found:

> "that the defendants were members of the conspiracy, and that the conversations were made during the course of the conspiracy. Immediately after the court's ruling, counsel for defendants Gish and Martin stated: '[Y]ou have also foreclosed the defendant's [sic] right under Rule 103 and 104 to take the stand in opposition to the Government's position.' The court responded: 'Well, the court has – do you want to do that now?' Counsel replied, 'Now?', and the court responded:
>
> > "Yes, or in the morning? I have had – no one suggested to me that you wanted to do that, I have as of now made a finding based upon the evidence offered by the government, without hearing any of the hearsay statements. That is not necessary, that I feel that there is ample evidence of a conspiracy. Now, if – to allow the hearsay statements to go ahead. [sic]
> >
> > Now, if you are asking for a time to do that in which you want to contest the evidence outside of the hearing of the jury, the court might be willing to consider that, but I have had no request up until now that I knew of for that."
>
> 'Counsel seemingly waffled at the offer, stating':
>
> > This has been so heated, we have had to continue it by virtue of the fact that of [sic]

> Billie's back problem. But specifically in my renewed motion requesting the court to make a pretrial determination of the issue, I specifically advised the court as I did in July that of course if this comes, if push comes to shove, the defendants would like, it is my desire they be put in a position to, out of the presence of the jury, to testify on the issue.
>
> THE COURT: "That had to do with whether or not the court felt a pretrial hearing was necessary. That was last Friday, and I held it was not."
>
> MR. HUMPAGE: Correct.
>
> THE COURT: "Now you are asking, and that is a new question as far as the court is concerned now, as to whether you should be permitted to come in outside the presence of the jury, and contest what has been testified here to in regard to the existence of a conspiracy."

The Court additionally found that the defendants did not accept the court's offer. The Court's Opinion found at (A. 8a-10a):

> "The only contention of which the trial court was advised was that conspiracies were not formed because no agreement had been consummated. Under these circumstances, we do not believe the constitutional dilemma now posited by the defendants was preserved for review. *Las Vegas Ice and Cold Storage Co. v. Far West Bank*, ___F.2d___, 1990 WL 1292, p.6, fn.3 (10th Cir. 1990).
>
> We might be inclined to a different posture if any defendant had made a showing of what his testimony might be or that his testimony would vitiate the government's prima facie case. Instead of an offer of proof, the court was presented with generalizations. More importantly,

> none of the defendants made his request for a hearing until after the court ruled, and when the court offered an immediate hearing, the offer was not accepted. Given all these circumstances, even if the issue were before us, we would not conclude the district court erred."

The Petitioners' Pretrial Motion seeking a determination sought more than a pretrial determination of the existence of a conspiracy, as announced, the Petitioners desired to testify on the issue out of the presence of the jury. Rule 104(c) F.R.E. The Petitioners' Renewed Motion for a Pretrial Determination was filed on August 1, 1988, Gish, (Docket No. 65); Martin (Docket No. 63); Waggoner (Docket No. 60). The Court on October 4, 1938, after a hearing overruled the Petitioners' Motions (R. Doc. No. 75). The Petitioners' Renewed Motion for A Pretrial Determination requested that the hearing sought be out of the presence of the jury in relation to the conspiracy pled and further reflects, relevant portions, the following:

> In all deference to Mr. Shernuk, the Court's resolve of the conspiracy pled herein is not as simple as Mr. Shernuk reflects, as it requires far more than the agents' testimony in support of the Government's position, and will further require the use of the recorded conversations along with the video tape, assuming the defendant can participate in the hearing required in relation thereto, same being a condition precedent to allow for the admission of acts or declarations of the alleged co-conspirators herein, assuming same exist, realizing that the defendants will vehemently object to their introduction, as the statement or acts do not qualify under rule 801(d)(2)(E), and requires that the Court must be satisfied "that the statement actually falls within the definition of the rule. The government must introduce evidence that there

> was a conspiracy involving the declarant and the non-offering party, and the statement was made in the course of and in furtherance of the conspiracy". Hence, the Court must make this resolve initially, pursuant to Rule 104 prior to allowing the statements admission. The defendants have advised the Court, through counsel, that by virtue of the apparent discrepancies, they wish to testify out of the presence of the jury in relation thereto, pursuant to Rule 104(c) and Rule 103(c), F.R.E., which requires that the preliminary facts, relevant to Rule 801(d)(2)(e), . . .

The Petitioners' desire in this regard is further evidenced in the Petitioners' request of July 22, 1988, (R. Doc. No. 58), which is reflected in the Petitioners' Renewed Motion for a Pretrial Determination, however, was not designated in the record in appreciation of the Circuit's Rule 10.2.4 which provides "The court of appeals has access to, and may examine, any of the original papers and exhibits filed in the district court, whether or not designated for inclusion in the record." The Trial Court's oral ruling in relation thereto being found herein at (A. 21a-28a) which clearly reflects that counsel advised the court in addition, the Petitioners, Gish, Martin and Waggoner are going to have to testify on the issue of conspiracy, and, of course, their testimony is going to be forthcoming under Rule 104(c) and 103(c)(d). The Circuit's Opinion (A. 9a, N.3) found that "In their brief, defendants refer to a pretrial written 'offer of proof.' That document is a rather prolix litany of the inconsistencies in portions of the government's written evidence coupled with a brief on the issue of coconspirator testimony. Nothing in that document suggests an offer of proof. (Vol. I, documents 63 and 65)."

The Petitioners' Renewed Motion for Pretrial Determination at page three (3), paragraph two (2), reflects the Petitioners' Offer of Proof in relation to same pursuant to Rule 103(2) F.R.E. Counsel for the Petitioners advised the court subsequent to the court's ruling the court's findings were made without review of the Government's tapes, but in addition, the court's ruling foreclosed the defendant's right under Rule 103 and 104 F.R.E. to take the stand in opposition to the Government's position, out of the presence of the jury. (Tr. p. 110.)

Counsel for the Petitioners thereafter advised the court that I specifically advised the court as I did in July that of course if this comes, if the push comes to the shove, the defendants would like, it is my desire that they be put in a position to, out of the presence of the jury, to testify on this issue. Further counsel for the Petitioners advised the court candidly that Martin's testimony is there is no agreement. He left them and never went back, never contacted them. Of course in addition Gish's testimony will reflect there was no agreement. He may have been there, but mere association or presence in and by itself does not suffice to make a finding of conspiracy. But his testimony will be there was none. I thereafter advised the court that our position under Rule 103 and 104 F.R.E., as I understand it, on the preliminary issue in determination of a conspiracy, which the court has just made, the Petitioners are afforded the right to address and testify contrary, or testify either contrary or supportive thereof that no conspiracy existed, and the privilege is extended to outside the presence of the jury. (Tr. pp. 110-113.) Counsel for the Petitioners advised the court on July 22, 1988, that both Petitioners, Gish and Martin are going to

have to testify on the issue of conspiracy and, of course, their testimony is going to be forthcoming under Rule 104(c) and 103(c) and (d) F.R.E., which is further found in the Petitioners' Renewed Motion for a Pretrial Determination on October 4, 1988, (R. Doc. Nos. 60, 63, 65), further being found in the course of the Petitioners' trial, more particularly on October 11, 1988, and on December 22, 1988, during the hearing afforded the Petitioners on their post-trial Motions wherein the Trial Court agreed to hear the Petitioners' testimony on this issue, (A. 38a-42a); the Trial Court's written Memorandum Decision of July 22, 1988, (A. 15a-20a); the Trial Court's oral ruling of July 22, 1988, being found in (A. 21a-28a); the Court's oral ruling of October 4, 1988, being found in (A. 29a-32a); and the Court's oral ruling of October 11, 1988, being found in (A. 33a-37a). Generalizations, offer of proof, is found attached to the Petitioners' Renewed Motion for Pretrial Determination, (R. Doc. Nos. 60, 63, 65), page two (2) of same reflecting the Petitioners' desires to testify in relation thereto out of the presence of the jury pursuant to Rule 104(c) and 103(c) F.R.E. Further during the course of the Petitioners' trial, counsel advised the court that Martin's testimony would be there was no agreement, he left them and never went back, never contacted them. Of course in addition, Gish's testimony will reflect that there was no agreement. He may have been there, but mere association or presence in and by itself does not suffice to make a finding of conspiracy. But his testimony will be that there was none. (R. Vol. 1, Doc. No. 129, p. 112.) The litany found in the "offer of proof", the testimony of the Petitioners, the agents, the agents' narratives and the agents' tapes would surely have afforded corroboration

to the Petitioners' testimony and the needed continuity to allow the court to have fully considered the existence of the conspiratorial agreement as to one or all of the Petitioners and particularly as to the Petitioner Martin, which is evidenced in the court's Order of December 22, 1988, the Court's ruling being found in (A. 43a-44a).

In addressing Rule 104 F.R.E., this Honorable Court determined "that the existence of a conspiracy and petitioner's involvement in are preliminary questions of fact under Rule 104, must be resolved by the court. Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary Rules, which embody certain legal and policy determinations." *Bourjaily v. United States,* 483 U.S. 171, 175, 97 L.Ed.2d 144, 152, 107 S.Ct. 2775 (1987). Further, "If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issues." *Bourjaily,* 483 U.S. at 180 n.2. To avail the Petitioners to the provisions of Rule 104(c) F.R.E., what else could the Petitioners have done. The Tenth Circuit's Opinion reflects that "at no time did any defense counsel suggest that his client wanted to take the stand to testify, or that any defendant believed himself torn between needs to testify about the existence of a conspiracy and his right not to incriminate himself", which the Trial Court found to the contrary on December 22, 1989, during the Petitioners' post-trial Motions. (A. 39a-42a) Rule 103(a) F.R.E., further being enhanced by our litany of generalizations, offer of proof, to the point of ultimate acknowledgement by the Trial Court, hopefully negating waiver. *United States v. Markopoulus,* 848 F.2d 1036, 1039 (10th Cir. 1988). The Petitioners certainly "alerted the court to the fact that they were objecting on hearsay

grounds". *United States v. Gomez*, 810 F.2d 947, 951 (10th Cir. 1951). The Petitioners' complaints both pretrial and during trial which were ultimately acknowledged by the Court during the hearing on the Petitioners' post-trial Motion was sufficient to allow the Trial Court "to take appropriate corrective action to preserve the claim for review". *Douglas v. Alabama*, 380 U.S. 415, 422, 13 L.Ed.2d 934, 939, 85 S.Ct. 1074 (1965).

In review of the Report of the House Committee on The Judiciary in relation to Rule 104(c) F.R.E., we find:

> "Rule 104(c) as submitted to the Congress provided that hearings on the admissibility of confessions shall be conducted outside the presence of the jury and hearings on all other preliminary matters should be so conducted when the interests of justice require. The Committee amended the Rule to provide that where an accused is a witness as to a preliminary matter, he has the right, upon his request, to be heard outside the jury's presence. Although recognizing that in some cases duplication of evidence would occur and that the procedure could be subject to abuse, the Committee believed that a proper regard for the right of the accused not to testify generally in the case dictates that he be given an option to testify out of the presence of the jury on preliminary matters."

2. The Tenth Circuit's Holding on the Issue of a Drug Trafficking Conspiracy is in Conflict With the Tenth Circuit's Previous Decisions Along With the Decisions of the Seventh, Ninth and Eleventh Circuits and is Further in Conflict With Decisions of This Honorable Court.

In the Tenth Circuit's Opinion addressing the conspiratorial agreement, the Circuit's Opinion is reflected in

(A. 1a) "That Mr. Martin was brought to the meeting only to examine the merchandise as an agent for the 'money man', and in that capacity he carried out his role in the conspiracy." The record reflects that the Government's agents further acknowledged that Dan and the person who was supposedly the money man did not know each other, and they further acknowledged that the transaction was conditioned by the Defendant Evans on being able to get money from people in Texas and California. (R. Doc. No. 129, pp. 163, 165-166)

As all agreements, including all conspiracies, have some conditions, implied or expressed "subjective or objective likelihood" could become an issue in every conspiracy trial. What is true is that the more fantastic the condition, the lower the probability that the Petitioner actually agreed to commit an offense. Certainly if the conditions were known to be impossible of fulfillment when the agreement was made (mere supervening impossibility would not defeat a conspiracy charge, see *United States v. Jones*, 765 F.2d 996, 1002 (11th Cir. 1985), the agreement could not sensibly be understood as an agreement to do something; it would be a mere rhetorical flourish. (*United States v. Podolsky*, 798 F.2d 177 (7th Cir. 1986) (pp. 178-179).

In the present case the only evidence implicating the Petitioner Martin was his presence on April 20, 1988, at the DEA's Motel Room in Manhattan, Kansas, and being the recipient of the DEA's offer of sale of controlled substances to which the Petitioner Martin responded that he lacked the funds required to make the purchase, but that he would see if his lack of funds could be remedied and he would get back to the DEA agents. The evidence

clearly establishes that the Petitioner Martin had no further contact with the agents, including the Defendant Evans or the informant. It is clear that Martin's statement was nothing more than a rhetorical flourish because there is no reason to believe that he had the responsibly immediate apparent ability to obtain the financial resources with which he could negotiate an agreement with the DEA agents. Under the evidence of this case, it is clear that Martin and the DEA agents had not even reached the stage where they had an agreement to negotiate, let alone an agreement that they would commit an unlawful act.

To paraphrase the Court in *United States v. Podolsky, supra:*

> "Of course, if the condition is a condition not of committing the agreed upon act (in this case, buying marijuana), but of agreeing in the first place, there is no criminal conspiracy unless and until the condition is satisfied. Martin, having said, 'I don't have that kind of money and will contact you later', and never again contacting the officers, there is no agreement to buy marijuana. There is only an agreement to negotiate, at some future date, if he can obtain money, and an agreement to negotiate an agreement to purchase marijuana is not an agreement to purchase marijuana." (Paraphrasing *United States v. Podolsky*, 798 P.2d 177 (7th Cir. 1986), p. 178; see also, *United States v. Melchor-Lopez*, 627 P.2d 886, 892 (9th Cir. 1980)

Since Martin clearly never agreed to anything more than to suggest he would contact the agents in the future, there was no agreement.

"The most basic element of a drug trafficking conspiracy is an agreement between two or more persons to

violate the federal narcotics laws. The government must prove by direct or circumstantial evidence that a conspiracy existed that the defendant knew at least the essential objectives of the conspiracy, and that the defendant knowingly and voluntarily became a part of it." *United States v. Savaiano*, 843 F.2d 1280, 1294 (10th Cir. 1988); *Ingram v. United States*, 360 U.S. 672, 677-678, 3 L.Ed.2d 1508, 79 S.Ct. 1314 (1959).

The Trial Court's findings of December 22, 1988, "I would have to say that the, there may be, the evidence was not strong in regard to the defendant Martin, but apparently the jury thought it was sufficient, and I thought it was sufficient to go to the jury, and the jury found that he had participated." (A. 44a) This could hardly be equated to a preponderance finding.

CONCLUSION

For these reasons, the writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

JOHN C. HUMPAGE, #04721
1208 SW Tyler
Topeka, Kansas 66612
(913) 235-5351
Counsel for Petitioners

WILLIAM K. RORK, ESQ.
1243 S. Topeka Blvd, Ste. A
Topeka, Kansas 66612
(913) 234-0040

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES GUY GISH, JAMES MICHAEL WAGGONER, and DANIEL R. MARTIN, Defendants-Appellants.	)	Nos. 89-3006, 89-3007, and 89-3008 (D.C. Nos. 88-40015-02, 88-40015-03 and 88-40015-04) (D. Kansas) Filed FEB 28 1990

ORDER AND JUDGMENT*

Before HOLLOWAY, Chief Circuit Judge, and SEYMOUR and MOORE, Circuit Judges.

This appeal arises out of the joint trial of four defendants, three of whom have joined forces here. All were convicted of conspiring to possess, with intent to distribute, 500 pounds of marijuana, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 18 U.S.C. § 2. Defendants raise three

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*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

issues on appeal: (1) denial of an opportunity to testify outside the presence of the jury on the issue of the existence of a conspiracy; (2) improper joinder; and, (3) the existence of "multiple conspiracies." We conclude there is no merit to any of the contentions, and we affirm.

In early April 1988, Drug Task Force Agent, Robert Benton, was introduced to Don Evans, a codefendant not included with the defendants in this appeal, by a paid informant, Joe Meder. Mr. Meder had told Agent Benton that Mr. Evans knew people who wanted to buy marijuana in large quantities.

On April 13, 1988, Agent Benton, Agent James Woods, and Mr. Evans met to discuss the purchase of 500 pounds of marijuana. A surreptitious tape recording made of that conversation was introduced into evidence. During that conversation, Mr. Evans referred to two persons who would be participating in any purchase. One, not identified by name, was described as the "money man." The second individual, identified as "Jim," was to examine the merchandise offered by the agents and make a recommendation to the "money man" whether the purchase should be made. A considerable amount of conversation revolving around the purported decision-making authority of "Jim" ensued, but nothing else of substance took place. Mr. Evans was told, however, when his contacts were ready to pursue the deal, that Mr. Evans was to telephone Mr. Meder.

Six days later, Agent Benton and Mr. Evans conferred by telephone and agreed to meet the following day so that the task force agents could display their merchandise to the emissary of the prospective buyer. On April 20,

1988, Agents Benton and Woods and Mr. Meder met with Mr. Evans, defendant James Gish, and defendant Daniel Martin at the "Holidome" in Manhattan, Kansas. Mr. Evans arrived at the meeting alone, and Mr. Gish and Mr. Martin, traveling together, arrived about twenty minutes later. The entire party then left for a room the agents had rented in another hotel.

Once there, Mr. Evans and Mr. Martin went with the agents and Mr. Meder to the room, leaving Mr. Gish outside in his car. A videotape of the meeting in the room was secretly made and subsequently received in evidence. The tape shows Mr. Martin and Mr. Evans examining a 5 pound brick of marijuana displayed by the agents, smoking a cigarette made from the brick, and discussing the purchase of 500 pounds of marijuana, of which the brick was supposed to be a sample.

Mr. Martin stated he wanted to make the purchase, as the price of $300 per pound was right and the quality of the substance was high, but he had to contact his "people" who would supply the money. In vague terms, he talked about a "man in New York" and another in Texas, stating either or both would wish to consummate the transaction. The meeting broke up when Mr. Martin stated he wanted to go to a pay telephone to make "a few calls" to line up the funds for the purchase.

The videotape also shows a subsequent meeting in the same room between the agents and Mr. Evans which apparently took place a short time later. Mr. Evans told the agents Mr. Martin had contacted the man in New York, and the latter wanted to make the purchase. He also stated the man in Texas was interested as well. Neither

man, according to Mr. Evans, was willing to commit himself, but Mr. Martin would know the following morning whether either man would come to Kansas to consummate the transaction.

Additional telephone conversations between Mr. Evans and Agent Benton were tape-recorded over the following two weeks. During these conversations, the recordings of which were admitted into evidence, Mr. Evans made representations indicating he and his associates were about to conclude the purchase. In a conversation which took place on May 10, 1988, Mr. Evans stated another man, "Larry," was now interested in purchasing 500 pounds and that Larry would have the cash on May 12. "Larry" was later identified as defendant, James Waggoner.

On May 12, Agent Benton met with defendants Evans, Waggoner, and Gish in a restaurant in Topeka, Kansas. A tape recording of the conversation between the parties was made and introduced into evidence. After talking briefly inside the restaurant, Mr. Waggoner, Mr. Evans, and Agent Benton entered Mr. Waggoner's pickup truck in the parking lot, leaving Mr. Gish outside to act as a lookout. Mr. Waggoner gave Agent Benton a blue duffel bag containing two separate packages. The tape recording of the conversation that ensued indicates Agent Benton counted $58,000 in one package and $60,000 in another. As Mr. Waggoner was saying he had "another buddy in town that's got another 50," Mr. Evans interrupted to say, "It's like I was telling Rob. [Agent Benton] It's time to collect. Time to get everything rounded up." Mr. Waggoner responded, "Yeah." The conversation briefly continued, and then Agent Benton stated: "DEA partners."

Defendants Waggoner, Evans, and Gish were placed under arrest.

Prior to trial, defendants filed pleadings seeking a pretrial determination of the existence of a conspiracy as a predicate to the possible introduction of the statements made during the conversation between various defendants and the agents. The trial court, in reliance upon *United States v. Hernandez*, 829 F.2d 988 (10th Cir. 1987), *cert. denied*, 485 U.S. 1013 (1988), and the government's representation that it would establish the existence of the conspiracy at trial before the introduction of any conversation, denied a pretrial hearing.

At trial, the prosecution introduced the testimony of Agent Benton describing his observations of the various contacts between himself and the defendants. The government then indicated it wanted to take up the issue of the various statements of the defendants. The jury was discharged, and the court heard the arguments of counsel for both sides at length. Defense counsel's arguments stressed the government's failure to establish, as one phrased it, "the conspiratorial agreement to distribute marijuana." (Vol. II at 99). Counsel for defendant Martin argued that no agreement was consummated during the meeting in Manhattan, so Mr. Martin could not be linked to any conspiracy. He further argued the meeting in Topeka was only for the purpose of displaying money, and that no agreement was reached at that time. Counsel for Mr. Waggoner joined in the arguments of other counsel and then stated his client would be adversely affected without a further hearing outside the presence of the jury to determine "what statements may be in furtherance of

the conspiracy, what may be in the course of any conspiracy, if in fact there is a conspiracy . . . ." (Vol II at 104). He further argued that the government failed to prove the existence of an agreement. At no time did any defense counsel suggest that his client wanted to take the stand to testify, or that any defendant believed himself torn between the need to testify about the existence of a conspiracy and his right not to incriminate himself. (Vol. II at 98-106).

Following these arguments, the trial court ruled. (Vol II at 106-10). The judge found, by a preponderance of the evidence, that a conspiracy existed, that the defendants were members of the conspiracy, and that the conversations were made during the course of the conspiracy.[1] Immediately after the court's ruling, counsel for defendants Gish and Martin stated: "[Y]ou have also foreclosed the defendant's [sic] right under Rule 103 and 104 to take the stand in opposition to the Government's position." The court responded: "Well, the court has – do you want to do that now?" Counsel replied, "Now?", and the court responded:

> Yes, or in the morning? I have had – no one suggested to me that you wanted to do that, I have as of now made a finding based upon the evidence offered by the government, without hearing any of the hearsay statements. That is not necessary, that I feel that there is ample

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[1] It should be noted, the trial court did not use those specific terms. The context of the court's remarks could not be taken any other way, however. In particular, *see* Vol. II at 109, lines 18-25.

> evidence of a conspiracy. Now, if – to allow the hearsay statements to go ahead. [sic]
>
> Now, if you are asking for a time to do that in which you want to contest the evidence outside of the hearing of the jury, the court might be willing to consider that, but I have had no request up until now that I knew of for that.

Counsel seemingly waffled at the offer, stating:

> This has been so heated, we have had to continue it by virtue of the fact that of [sic] Billie's back problem. But specifically in my renewed motion requesting the court to make a pretrial determination of the issue, I specifically advised the court as I did in July that of course if this comes, if push comes to shove, the defendants would like, it is my desire they be put in a position to, out of the presence of the jury, to testify on the issue.
>
> THE COURT: That had to do with whether or not the court felt a pretrial hearing was necessary. That was last Friday, and I held it was not.
>
> MR. HUMPAGE: Correct.
>
> THE COURT: Now you are asking, and that is a new question as far as the court is concerned now, as to whether you should be permitted to come in outside the presence of the jury, and contest what has been testified here to in regard to the existence of a conspiracy. . . .

None of the defendants accepted the court's offer to conduct a hearing at that time. The court finally agreed to take the matter under consideration and rule after the evening recess. Then, prior to the recess, counsel for Mr. Waggoner stated:

> Only thing defendant Waggoner would say, if the court can independently determine there

> was a conspiracy from the evidence presented so far without the necessity of any testimony of Mr. Waggoner, *then I guess we wouldn't be afforded a James hearing*. If in the court's determination if you reconsider your previous decision, we would like to present Mr. Waggoner for testimony outside the presence of the jury.

(Vol. II at 114) (emphasis added). Upon convening the next morning, the court announced it had reflected on the issue and determined it would not permit testimony from the defendants. (Vol. II at 115-16).

We believe two observations flow from the record at this point. One, it is fairly inferable that the court believed a prima facie case had been made as required under *Hernandez*, and that the testimony of defendants Waggoner and Martin that no agreement had been reached would not change that belief.[2] It is notable counsel for Mr. Waggoner made that concession in his statement prior to the evening recess. Second, it is equally fair to say the trial court was never called upon to deal with the alleged constitutional dilemma with which defendants now argue they were faced. Not one defendant expressed that argument to the trial court, and none stated anything from which that suggestion could be inferred. The only contention of which the trial court was advised was that conspiracies were not formed because no agreement had been consummated. Under these

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[2] Indeed, in response to counsel's argument regarding the failure to consummate an agreement, the court commented the issue was for determination by the jury with proper instructions. (Vol. II at 109).

circumstances, we do not believe the constitutional dilemma now posited by the defendants was preserved for review. *Las Vegas Ice and Cold Storage Co. v. Far West Bank*, ___ F.2d ___, 1990 WL 1292, p.6, fn.3 (10th Cir. 1990).

We might be inclined to a different posture if any defendant had made a showing of what his testimony might be or that his testimony would vitiate the government's prima facie case. Instead of an offer of proof, the court was presented with generalizations.[3] More importantly, none of the defendants made his request for a hearing until after the court ruled, and when the court offered an immediate hearing, the offer was not accepted. Given all these circumstances, even if the issue were before us, we would not conclude the district court erred.

To the extent defendants contend they had a right to a pretrial determination of the predicate factors for the admission of coconspirator statements, we likewise find no error. Even though the Court, in *Bourjaily v. United States*, 483 U.S. 171 (1987), held a trial court must make a preliminary determination of the existence of a conspiracy and a defendant's role in that conspiracy, the Court did not require that these determinations be made at an evidentiary hearing prior to trial. We have left determination of the nature of the hearing and order of proof to the sound discretion of the trial court. *Hernandez*, 829 F.2d at

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[3] In their brief, defendants refer to a pretrial written "offer of proof." That document is a rather prolix litany of the inconsistencies in portions of the government's written evidence coupled with a brief on the issue of coconspirator testimony. Nothing in that document suggests of an offer of proof. (Vol. I, documents 63 and 65).

993-95. As we have already noted, in compliance with the mandates of *Hernandez*, the trial court made a proper determination of the predicate facts prior to permitting introduction of the statements. We have not been shown, nor can we find, abuse of the trial court's discretion.

Defendants contend that joinder of counts and defendants was improper. For proper joinder, there must be a common nexus. Where the evidence overlaps, as in this case, and the events occurred within a relatively short time span, and the offenses are similar, joinder of defendants and offenses is proper. *United States v. Esch*, 832 F.2d 531, 538 (10th Cir. 1987), *cert. denied*, 485 U.S. 908 (1988).

Defendants contend because only Mr. Evans was charged with a telephone offense, the two counts of the indictment do not have a common nexus. This overlooks, of course, the fact that Mr. Evans' use of the telephone was to effect the conspiracy charged in the remaining count. We think the telephone count was factually and temporally related to the conspiracy count so that the *Esch* test has been met. Moreover, Fed. R. Crim. P. 8(b), relating to the joinder of defendants, must be construed broadly to allow liberal joinder; and the defendants bear a heavy burden to show prejudice by the joinder. *United States v. Hopkinson*, 631 F.2d 665, 668 (10th Cir. 1980), *cert. denied*, 450 U.S. 969 (1981). Defendants have not carried this burden.

Defendants further argue that their motion to sever should have been granted because the evidence at trial showed the existence of more than one conspiracy. This, of course, is an issue for the jury. *United States v. Dickey*,

736 F.2d 571, 581 (10th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985). To be sure, not all defendants participated in every event which formed the overt acts of the conspiracy. Nonetheless, there was a sufficient commonality of participation upon which the jury could have rested their verdict.[4] Suffice to say, however, we are not persuaded that each meeting between the agents and one or more of the defendants constituted a separate conspiracy. We need only point out that there is evidence present from which the jury could have found each defendant played a role in the overall scheme to buy the marijuana the agents purportedly had for sale.[5] Within this framework, the jury could have found the existence of a single conspiracy. *Id* at 582.

Mr. Martin also argues that a conspiracy requires a completed present agreement to commit a criminal act. He urges that the only evidence against him indicates he did not reach that agreement because his participation in the transaction was conditioned upon his obtaining financing. That representation overlooks the evidence that Mr. Martin was brought to the meeting only to examine the merchandise as an agent for the "money man," and in that capacity he carried out his role in the conspiracy. Under the evidence presented to the jury, it was not

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[4] Unfortunately, none of the instructions were included by defendants in the record.

[5] We find insignificant the fact that Mr. Waggoner was not present at the Manhattan meeting and Mr. Martin was not at the Topeka meeting. Both men were linked to Mr. Gish, and Mr. Gish appeared in both places.

expected that Mr. Martin was to make the purchase himself, although he did indicate in the agent's hotel room that he wanted to make the deal and would make a favorable recommendation to the "man in New York." In this scenario, Mr. Martin's inability to obtain sufficient money in Manhattan is irrelevant to the proof of the conspiracy. We need not, therefore, deal further with Mr. Martin's argument.

AFFIRMED.

Entered for the Court

John P. Moore
Circuit Judge

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES GUY GISH, JAMES MICHAEL WAGGONER and DANIEL R. MARTIN, Defendants-Appellants.	)	Nos. 89-3006 89-3007 89-3008

ORDER

Filed May 3, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing, with suggestion for rehearing en banc, filed in the captioned cases.

Upon consideration of the petition for rehearing, the petition is denied by the panel to whom the cases were argued and submitted.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member

of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)	Case No. 88-40015-01/02/03/04
vs.	)	
THOMAS JOEL EVANS, JAMES GUY GISH, JAMES MICHAEL WAGGONER and DANIEL R. MARTIN,	)	FILED JUL 29 1 52 PM '88
Defendants.	)	

MEMORANDUM AND ORDER

On July 22, 1988, the court held a hearing on the pretrial motions filed by the defendants. The court ruled on each of the motions at that time. The purpose of this order is to memorialize the rulings made by the court.

The defendants are charged in a two-count indictment. In Count I, the grand jury alleges that from on or about April 13, 1988 and continuing through May 12, 1988, the defendants did possess with the intent to distribute approximately 500 pounds of marijuana in violation of 21 U.S.C. §§ 846, 841(a)(1) and 18 U.S.C. §2. In Count II, the grand jury alleges that on or about May 10, 1988, defendant Evans did use the telephone to cause and facilitate the felony of conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. §843(b).

The defendants filed a variety of motions. The court intends to briefly summarize most of the motions and the

rulings thereon. The court will engage in an extended discussion on only a few of the motions.

We note initially that defendant Evans filed a motion to join in the motions of the other defendants. This motion shall be granted.

The defendants filed several motions seeking various types of discovery materials. In these motions, the defendants sought all materials they are entitled to under Fed.R.Crim.P. 16 and *Brady*, as well as certain information concerning the government's witnesses. The government responded that they are maintaining an "open file" in this case. The government indicated that the defendants have access to all of the materials they requested. Given the government's response, the court shall deny the defendants' motions. The government has sufficiently complied with the defendants' requests.

The defendants also filed motions for a pretrial conference pursuant to Fed.R.Crim.P. 17.1 and motions for pretrial determination of the admissibility of co-conspirators' statements pursuant to F.R.E. 801(d)(2)(E). In the motion for pretrial conference, the defendants suggested that a conference was necessary to decide numerous pretrial issues. Defendants suggested that such a procedure would expedite the trial. However, as the court pointed out at the hearing, the defendants have not identified a single issue that needs to be determined prior to trial, except the issue of the admissibility of the co-conspirators' statements. Under these circumstances, we do not believe that a pretrial conference is required. The court shall consider separately whether a pretrial hearing on

the admissibility of the co-conspirators' statements is necessary.

The issue of whether to provide a pretrial determination of the admissibility of co-conspirators' statements was recently addressed by the Tenth Circuit in *United States v. Hernandez*, 829 F.2d 988 (10th Cir. 1987). In *Hernandez*, the Circuit Court discussed the relevant law on the admission of co-conspirators' statements pursuant to Rule 801(d)(2)(E), including the Supreme Court's pronouncement in *Bourjaily v. United States*, ___ U.S. ___, 107 S.Ct. 2775 (1987). The Court noted that the "preferred order of proof" was for the trial court to make the requisite factual determination of the existence of a conspiracy prior to allowing co-conspirator hearsay statements to be heard by the jury. 829 F.2d at 944 n. 6. The Court further stated that "this order of proof does not involve a right to a pretrial hearing on admissibility, and in no way precludes the trial judge from exercising considerable discretion and conditionally admitting the statements subject to later being connected up." *Id.* The Court clearly implies that the question of whether to allow a pretrial hearing with regard to the conspiracy determination is within the discretion of the court.

Having carefully considered the circumstances of this case, we shall deny the defendants' motion for a pretrial determination. The government has suggested that this case is not overly complex, and a pretrial determination of the conspiracy at a pretrial proceeding would not save any time. Further, the government has indicated that it believes that it can establish the conspiracy in this case prior to the admission of any of the hearsay statements.

Given these circumstances, we believe that this issue can adequately be handled at trial.

Defendants Martin, Waggoner and Gish have filed motions to sever. In these motions, these defendants seek to have Count II of the indictment severed. They argue that Fed.R.Crim.P. 8 precludes the joinder of Count II with Count I. We disagree.

Rule 8(b) governs this motion because more than one defendant is involved. *United States v. Eagleston*, 417 F.2d 11, 14 (10th Cir. 1969). Rule 8(b) allows joinder of defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Thus, joinder is permitted of a conspiracy count and a substantive count arising out of the conspiracy, since the conspiracy provides a common link, and demonstrates the existence of a common scheme or plan. *United States v. Kopituk*, 690 F.2d 1289, 1313 (11th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *United States v. Warner*, 690 F.2d 545, 551 (6th Cir. 1982). Accordingly, the joinder of Count I and Count II in the instant indictment does not violate Rule 8(b). The defendants' motion to sever shall be denied.

The defendants filed motions for additional time to file other pretrial motions. The court notes that the defendants received some additional discovery at the court's hearing. The court shall grant the defendants' motion and allow them ten days to file additional pretrial motions.

Finally, the defendants filed motions for continuance. The defendants seek a continuance of a presently scheduled trial date based on the need for additional time to

prepare and the fact that counsel for two of the defendants will be on vacation from August 4, 1988 through August 20, 1988. The defendants' motions for continuance shall be granted. The ends of justice will be served by the granting of this continuance. The allowance of this continuance outweighs the best interest of the public and the defendants in a speedy trial. The continuance will allow the defendants the necessary additional period to prepare for trial. Accordingly, the trial of this case shall be continued until the last week of August, 1988 or the first week of September, 1988 pursuant to 18 U.S.C. §3161(h)(8)(A).

IT IS THEREFORE ORDERED that the motion to join filed by defendant Evans (Doc. #45) be hereby granted.

IT IS FURTHER ORDERED that the motions for discovery, inspection, copying or photographing filed by defendants Waggoner (Doc. #25), Gish (Doc. #32) and Evans (Doc. #44) be hereby denied.

IT IS FURTHER ORDERED that the motions for production of evidence favorable to the accused filed by all defendants (Doc. ## 26, 33, 39 and 47) be hereby denied.

IT IS FURTHER ORDERED that the motions for disclosure filed by all defendants (Doc. ## 30, 37, 42 and 46) be hereby denied.

IT IS FURTHER ORDERED that the motions for pretrial conference filed by all defendants (Doc. ## 29, 36, 41 and 50) be hereby denied.

IT IS FURTHER ORDERED that the motions for pretrial determination filed by all defendants (Doc. ## 28, 35, 43 and 49) be hereby denied.

IT IS FURTHER ORDERED that the motions to sever filed by defendants Waggoner (Doc. #23), Gish (Doc. #31) and Martin (Doc. #38) be hereby denied.

IT IS FURTHER ORDERED that the motions to enlarge filed by all defendants (Doc. ## 27, 34, 40 and 48) be hereby granted. The defendants shall be allowed ten days from the date of the hearing in which to file additional pretrial motions.

IT IS FURTHER ORDERED that the motions for continuance filed by all defendants (Doc. ## 54, 55, 56, and 57) be hereby granted. The trial of this case shall be rescheduled for the last week of August, 1988 or the first week of September, 1988.

IT IS SO ORDERED.

Dated this 29th day of July, 1988 at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX "D"

* * *

(p. 8) of a different color. Well, if the attorneys do not want to be heard, I think this will be a waste of time, so I'm going to deny the Motion for a Pretrial Conference.

Now, we have the Motion For a Pretrial Determination by all Defendants, and they want the existence of a conspiracy determined prior to trial so that the issue of admissibility of co-conspirators' statements pursuant to Federal Rules of Evidence 801(d)(2)(e) can be resolved. Now, does anyone want to say anything on this? We have a recent decision from the Tenth Circuit, *United States versus Hernandez*, 829 Fed 2d 988, in the Second Circuit 1987. It summarizes the Tenth Circuit and the Supreme Court case law on this issue, and it reviews the original case of *United States versus Andrews*, 585 Fed 2d 961, followed by *United States versus Petersen*, 611 Fed 2d 1313, and *Bourjaily versus United States* which is the United States Supreme Court case. And all of these cases, at least the last case, tells the Defendants that they have no distinct right to a pretrial hearing with regard to conspiracy determination, and making the decision at trial or before trial is (p. 9) proper. And generally the Government is required to put in enough evidence so the Court has some evidence in there that a conspiracy existed. And if I find that under *United States versus Andrews*, then the hearsay comments of the co-conspirators, of course, are admissible under the law, so does either side want to call to my attention – or, I mean, either attorney want to call to my attention here why this case is any different than the other cases?

MR. HUMPAGE: I would like to address that. We did briefly in the Motion for Continuance that's pending before the Court. We got the Government's response in opposition to our request for a pretrial determination, and as I pointed out in the motion, I don't agree with the Government in relation to their interpretation of Bourjaily. Of course, that doesn't come as any great surprise, but needless to say, after I've briefly reviewed the material provided by Mr. Shernuk this morning, I can assure the Court of two things in relation to that request. In addition, both Defendants Gish and Martin are going to have to testify on the issue of conspiracy, and, of course, their (p. 10) testimony is going to be forthcoming under Rule 104(c) and 103(c) and (d) on this particular issue. And, of course, in my humble opinion those rules, unless they can be judicially watered down to some degree, afford me a right based on this representation that the issue be resolved, of course, out of the presence of the jury. Minimally of course, I understand *Bourjaily*, but under *Bourjaily* there is no question that this Court is initially required to make a determination of the conspiracy's existence under Rule 104. And the statement was made in furtherance thereto before the matter can go to the jury – you know, very infrequently. I can say that I agree with the wisdom of the Circuit totally; however, I think the Circuit summed up my position in *Stipe*, 653 Fed 2d 446. The situation here, if we're going to allow a hearsay admission during the course of the trial subject to the Government connecting it up, which is always the usual course of pursuit, like the Circuit said, by the time the Government connects up the stated – or arrives at a point in the evidence, the evidence has been so blended

that there is no distinction (p.11) between hearsay and nonhearsay. That's *Stipe*, and I agree with the Court.

Now, I have viewed the Government's video tape in relation solely to one of the defendants that I represent. I have reviewed some ten cassette tapes concerning the DEA solicitation ongoing in nature of another Defendant. And the long and short of it concerning the two supposed meetings, one at Bennigan's and one at Manhattan, at least as far as I can determine they have not showed any type of conspiratorial agreement.

However, in support of my position I direct the Court's attention to Rule – the Advisory Committee's notes in relation to Federal Rule of Evidence 103(c), and, of course, the Advisory Committee points out this subdivision position that a ruling which excludes evidence in a jury case is likely to be pointless procedure if the excluded evidence, nevertheless, comes to the attention of the jury. I agree.

Now, in addition, they go on to say this is primarily directed to a motion to suppress, but there is no confines under Rule (p.12) 103(c) as the matter must be resolved out of the presence of the jury.

Now, the last time we were involved in a conspiracy case in this court, the Government came over and they wanted a pretrial determination under the conspiracy issue, and we had a pretrial determination on this issue. And, of course, I'm asking for no more. However, if we proceed, the Court additionally determining the admissibility of the co-conspirators' statements which is, from my knowledge from what I've been provided, pure hearsay. This case is one of the most bizarre cases I've ever

been exposed to. I think we've got a procuring agent in our midst, number one. Number two, even though I know that the law of conspiracy has greatly been watered down since the enactment of 21841(a)(1), nevertheless they don't have a conspiratorial agreement that I have yet viewed. And the Court based on that representation is forced to make the explicit finding as to the predicate facts, and I believe the Court just alluded to *United States versus Gomez*, 810 Fed 2d 847 at 9(a)(1), Tenth Circuit 1987. I hate to get into the trial of this case (p.13) and we adjourn and recess, put the jury out in the hall until we resolved the issues which apparently are going to be – require numerous testimony, and, of course, if these agents want to get up and testify in line of the reports I read this morning, then I'm going to have to go forth and play their own tapes because I can't find the representations on the tape concerning conversation with a Defendant or more than one Defendant. They're not there.

Now, in addition, in further support, of course, of our position, I think this matter ought to proceed out of the presence of the jury on the preferred order of proof, forcing the Government to establish the underlying predicate before receiving any co-conspirator testimony. I don't think that's totally unreasonable, and I direct the Court's attention to *United States versus Dufriend*, 691 Fed 2d, 948 at 950, 51. That's the Second Circuit in '82, and also *United States versus Radeker*, 664 Fed 2d 242 at 244 which is a Tenth Circuit case in 1981. We, in essence, so the record is abundantly clear, are requesting a James hearing, and, of course, I think so to be – prefaced on the fact that we (p. 14) want to make a determination whether the Government has established 801(d) Federal Rules

of Evidence. The exception or – in fact, we're dealing with conspiracy. This is – they have been getting away with this for years. I'm just quoting the Tenth Circuit in *Stipe*. They're always going to tie it up and, lo and behold, when we got to that point, nobody knows for sure what they have tied up, but if the issue has got to be addressed in front of a jury, there are some, maybe, collateral issues in this case that really don't have any relevancy concerning the charges found in the indictment, and I don't know how we're going to erase that from the minds of the jury.

THE COURT: I think I see your point. Let's see what the Government has to say.

MR. AMBROSIO: My man is charged with two counts in addition to the conspiracy count. He also has a telephone count. What I worry about is, we go through – in front of the jury at the time of trial all through these conspiracy issues assuming, arguendo, the Government could not show the predicate of that (p. 15) conspiracy and can not show conspiratorial agreement and the Government can't go forward, I'm stuck before the jury with a telephone count. I'm stuck and placed in a position where I then have to make application for a mistrial because all of that collateral garbage that's gone on before directly relates to my man, and how do we erase that from the jury. That's what I'm worried about because I'm the only one that's charged in this indictment with two counts. It puts me in a real bad situation. I would much rather determine this before trial. If there's a conspiracy, then we go on about our merry way and try it to the jury. If the Court finds there is no conspiracy, again I just received the information this morning, I'm not placed in a

situation where I have to make application for mistrial. It's a selfish reason for me, because I'm in a different position than the other defendants. That's all I have.

THE COURT: Mr. Shernuk.

MR. RORK: If I may briefly, the problem I have on behalf of Defendant Waggoner, there are conversations and statements made in Manhattan that may apply to persons unknown – or (p. 16) may or may not apply to Defendant Waggoner, that there are conversations and statements, in Topeka specifically – Mr. Waggoner was not present in Manhattan – and the difference in meeting twice, conspiracy statements that may be talking about him or not talking about him.

MR. SHERNUK: Briefly, without going into the *Hernandez* case, which the Court cited, we think pretty much clarifies the position, taking into account the recent Court position in *Bourjaily versus United States*. We think also that we would point out that Mr. Humpage's argument that he makes today about Rule 104 and the applicability and allow that it should come in, the Court specifically addressed that. And I don't have the official report, but in the Criminal Law Report at page 3352 and 3353 they really specifically address this issue about the Federal Rule of Evidence 104 and whether or not it is proper, considering that particular rule of evidence, to allow these statements to come in prior to the Court making the ultimate finding that is necessary. And their conclusion is that it is appropriate even under Rule 104 and that the purpose of the rule – Rule 104 is (p. 17) not defeated by the Court allowing the statements to come in prior to the Court making the ultimate finding.

In this particular case, Judge, we would tell you that for the most part the witnesses will be government agents. There is an informant involved, but the Government agents should be able to testify as to the events, transactions, meetings that occurred without getting into potentially all of the statements or any of the statements, necessarily, that were made. Just the fact the existence of the meetings, what the purpose of the meetings were, and generally when those meetings took place in relation to what defendants participated.

We think that information should go a long way in allowing the Court to make the findings that is necessary in this particular case, and that's why, under the facts of this case, we don't think a pretrial determination is necessary.

The case that Mr. Humpage reminded you of, the previous matter here was certainly different when we dealt primarily with wire-tap evidence and conversation. That was prior to (p. 18) the Supreme Court decision and we were concerned whether or not we could use those as independent proof – it was different circumstances and probably a different legal situation than we have here, and we would urge the Court to deny the pretrial determination.

THE COURT: From what I understand, the case is not overly complex and we have studied most of the affidavits which were filed for the warrants and it doesn't seem to be a very complex case. As of now I'm going to overrule and deny this motion, and we will look at it

further to see what it might do in your particular situation, Mr. Ambrosio, here I'm not sure how that might come into it.

MR. AMBROSIO: Thank you.

THE COURT: We also have a motion to sever by Martin, Waggoner and Gish. Defendants want Count 2, the count charging evidence about using the telephone, severed, and they suggest pursuant to Federal Rules of Criminal Procedure 8 the charge should not be joined with Count 1. Now, the Court has studied this. Rule 8 provides a great deal of information about joinder of offenses and

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(p. 26) until after a conspiracy has been fully established by other evidence.

But let me point out to you once again that even if a statement did come in – and the Appellate Courts have approved statements of co-conspirators coming in as long as sufficient evidence eventually was furnished in regard to a conspiracy, and I say that that is not fatal error to a trial of this case. The Government insists that this is not a complicated case, that it's a rather simple case, and so I do not foresee that we'll have any insurmountable problems in the trial of this case. So that will be the order of the Court in this case. Now, Mr. Bailiff, let's recess the Court.

MR. HUMPAGE: Judge, can I ask you a question?

THE COURT: Yes.

MR. HUMPAGE: If during the course of the trial if we desire to present the testimony of the Defendants Gish and Martin in support of our position, the nonexistence of a conspiratorial agreement, would the Court indulge us with their testimony out of the presence of the jury pursuant to Rule 103?

(p. 27) THE COURT: We'll have to look at that when it comes up. Ordinarily, once the evidence is placed in, in regard to the existence of a conspiracy, the Court will rule that all of the requirements of the many cases that we know have been satisfied. And then, of course, all testimony that ties in any defendant by the testimony of

some other person, the statements of some other person in the trial can come in.

MR. HUMPAGE: What I have reference to with Rule 102 and 103 at this juncture was that the Defendants announced in a motion that they had a desire to testify on the question of the existence of a conspiracy, and the rule contemplates if requested that their testimony can come to pass or should be heard out of the presence of the jury.

THE COURT: If they decide to testify, you're saying?

MR. HUMPAGE: Correct, on the issue of the existence of the conspiracy.

THE COURT: Well, we'll have to look at that at that time and see. Mr. Shernuk, do you have any thought about that as to how (p. 28) that might arise?

MR. SHERNUK: No. I think the Court has already addressed it by saying once the determination has been made preliminarily by the Court, the decision stands, and the rest of it, then, it would get back to sufficiency of the evidence question which is for the jury.

MR. HUMPAGE: That isn't what I understand Rule 102 and 103 – I'm given to understand by the Advisory Committee notes in reading the rule, if, in fact, during the course of the Court's determination on the existence of a conspiratorial agreement the defendant who would like to testify, his testimony can be forthcoming out of the presence of the jury.

THE COURT: Well, are you talking now about a Bruton question?

MR. HUMPAGE: No, I'm talking – that possibility, but what I'm talking about is only as to the conspiratorial agreement where we're at, Judge, for instance, as indicated in the offer of proof. There's no question that Martin was present in Manhattan during the course of the DEA agent's offer of sale. There's no question about it.

(p. 29) However, the question is, was a conspiratorial agreement consummated, and the answer is no. He told him he couldn't participate. He didn't have the money, et cetera. Now, that testimony would be damaging in front of a jury, but it's his testimony that will be needed to support his position or our position that there never was a conspiratorial agreement. And as I understand the rule, we can ask the Court's indulgence under the rules that the Defendant be allowed to testify to this issue out of the presence of the jury.

THE COURT: Well, until I see how the situation arises, I cannot tell you that that will be granted. It might be granted, but until we see that – and you're now using a factual example that Mr. Shernuk has not used in saying how he was going to establish his conspiracy. He's going to use the statements of agents. If your man was there, why, of course – or if one of the Defendants was there when all this was taking place, it certainly would be allowed to go to the jury to see what his participation was. The Court can't say at this time, but we'll just have to take those (p. 30) questions up as they arise.

And, of course, I'm probably more – I'm probably the only person in this room who's interested in avoiding any type of error. Defendants love to find error in a case. Sometimes the Government wants to win so bad that

they're not worried about having error. The Court is the only one that is trying to avoid error in this case, and I'm going to be very cautious to try to avoid it because if we have error, I have to re-try it, you understand. So we're going to be actively trying to avoid error in this case.

All right, Mr. Bailiff, let's recess the Court.

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(p. 109) the rules as laid down by the United States Supreme Court.

Now the defendants have made considerable point about whether or not an agreement existed. I think the rule you find in the instructions that the court is going to give the routine rules of instruction in regard to conspiracy, will make the point that the agreement does not have to be a formal written agreement. It can even be an implied agreement. But the ruling that I have made – I am making today, I am not telling you that a jury will find an agreement. Those are argument [sic] to be made to a jury now, rather than to this court as to whether your individual defendants are tied in to the conspiracy or whether they just incidentally happened to be drifting by the neighborhood at that time, and were not part of the conspiracy.

To sum this up, the court is making the findings necessary under UNITED STATES VERSUS ANDREWS, UNITED STATES VERSUS PETERSEN, UNITED STATES – or BOURJAILY VERSUS THE UNITED STATES. I believe we are following that law consistently here in the ruling that I have just made and the government will be permitted tomorrow in further testimony to offer the, if you have any, hearsay statements of the co-conspirators in that case. (p. 110) So that will be the ruling of the court.

Anything else we need to do?

MR. HUMPAGE: Well, I want to leave this with you to ponder on overnight, if I may.

THE COURT: All right.

MR. HUMPAGE: The court's findings unfortunately were made without a review of the Government's tapes, but in addition based on your ruling, you have also foreclosed the defendant's right under Rule 103 and 104 to take the stand in opposition to the Government's position.

THE COURT: Well, –

MR. HUMPAGE: Out of the presence of the jury.

THE COURT: Well, the court has – do you want to do that now?

MR. HUMPAGE: Now?

THE COURT: Yes, or in the morning? I have had – no one suggested to me that you wanted to do that. I have as of now made a finding based upon the evidence offered by the government, without hearing any of the hearsay statements. That is not necessary, that I feel that there is ample evidence of a conspiracy. Now, if – to allow the hearsay statements to go ahead.

Now, if you are asking for a time to do that in which you want to contest the evidence outside of the (p. 111) hearing of the jury, the court might be willing to consider that, but I have had no request up until now that I knew of for that.

MR. HUMPAGE: This has been so heated, we have had to continue it by virtue of the fact that of Billie's back problem. But specifically in my renewed motion requesting the court to make a pretrial determination of the issue, I specifically advised the court as I did in July that

of course if this comes, if push comes to shove, the defendants would like, it is my desire they be put in a position to, out of the presence of jury, to testify on this issue.

THE COURT: That had to do with whether or not the court felt a pretrial hearing was necessary. That was last Friday, and I held it was not.

MR. HUMPAGE: Correct.

THE COURT: Now you are asking, and that is a new question as far as the court is concerned now, as to whether you should be permitted to come in outside the presence of the jury, and contest what has been testified here to in regard to the existence of a conspiracy. If you are making a formal request, we will consider it. I want to look at the law. Want to see what the evidence is once it is in. It is in now I guess. I assume the same testimony will perhaps be (p. 112) given in front of the jury. I don't want to duplicate this trial. I don't know what your evidence will be. I assume your people are going to contest whether they were part of the conspiracy, and your people are going to contest I would guess if they do offer evidence –

MR. HUMPAGE: I can tell you candidly Martin's testimony is there was no agreement. He left them and never went back, never contacted them. Of course in addition Gish's testimony will reflect that there was no agreement. He may have been there, but mere association in presence in and by itself doesn t suffice to make a finding of conspiracy. But his testimony will be that there was none.

THE COURT: Those are matters for the jury to decide, not for the court to decide. The narrow question I am dealing with is whether there is sufficient evidence to allow in the hearsay statements of the co-conspirators.

MR. HUMPAGE: Our position under Rule 103 and 104 as I understand it, on the preliminary issue in determination of a conspiracy, which the court has just made, the defendants are afforded the right to address and testify contrary, or testify either contrary or supportive thereof that no conspiracy existed, and the privilege is extended to outside the presence of the (p. 113) jury.

THE COURT: The law seems to be clear no pretrial hearing is necessary, and that that matter is discretionary with a court. And I had exercised my discretion; that has been approved by both the Tenth Circuit Court and apparently by the United States Supreme Court in the procedure adopted.

MR. HUMPAGE: I am not suggesting the court has abused its discretion. What I am saying is the defendants can testify – what I have reference to is the court's preliminary determination of Rule 104, which the court just made, concerning the existence of the conspiracy. The defendants are afforded a right to address the issue and testify outside the presence of the jury under Rule 104. That is my position. In fact I asked the court about it the other day. The defendants' desire to testify on the preliminary issue, the court's findings that were just made. The court indicated as I recall when the issue arose the court would address it. I ask you to think on that issue tonight.

THE COURT: All right. We will ponder that over.

MR. HUMPAGE: Yell, because I pondered it all last night.

THE COURT: Mr. Shernuk, are you going to be

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(p. 5) uniformed about what the penalties are, and if Congress changes the penalties and does away with parole, and simply gives flat time sentences, no one seems to know that except the judges who have lost the discretion to give some compassion and leniency. Perhaps Congress is correct that we have been giving compassion and leniency; therefore, we have to buck these things and handle them the way they are handled with a great number of problems.

All right, let's move to the other matters then. The motion for new trial in this motion, you are contending that the court made an error in not allowing the defendants to testify outside the presence of the jury concerning the admissibility of the co-conspirators statements pursuant to Federal Rules of Evidence 801 (D)(2)(E). You also argue that the court made an error in overruling your motions for judgments of acquittal.

It is correct that several times during the trial the defendants asked the court to conduct a pretrial hearing on the issue of admissibility of the co-conspirators' statements. On each occasion we denied the defendants' motions for pretrial determination. We indicated we would handle the matter at trial. At the trial the government presented (p. 6) independent evidence of the conspiracy prior to the introduction of any statements. The government then asked the court to make the requisite findings so that the statements could be introduced. And the defendants' argument that the government had failed to make an absolute showing of the conspiracy. The court

ruled otherwise, and determined that the government could now issue, introduce the co-conspirators' statements. Mr. Humpage then argued on behalf of his clients that they should be allowed to testify on this issue. The court refused to allow that testimony at that time. The trial continued, and we heard the tapes containing the statements at issue.

At the conclusion of the case each defendant made a motion for judgment of acquittal, and in addition defendant Waggoner through Mr. Rork asked the court to make a requisite finding for the introduction of co-conspirators' statements. I overruled the motion for judgments of acquittal, determined that the government had demonstrated by a preponderance of the evidence that a conspiracy existed, that the defendants were members of the conspiracy, and that the statements made by them were made in the course of and in furtherance of the conspiracy. The defendants then announced they were resting.

(p. 7) I might say that was during the defendants' case that we had decided to hear any testimony they wanted to offer on the introduction of the co-conspirators' statements outside the presence of the jury, but the court – never during your case, you never asked the court to present any testimony at that time. Accordingly we proceeded to instruction and final argument.

Now in order to determine whether there were any errors, we need to further examine the law on this issue; and the rule in the Tenth Circuit is reasonably clear on

this. Now I am ready to hear any further argument anyone would like to have that you might want to, discussing UNITED STATES VERSUS BOURJAILY again, UNITED STATES VERSUS HERNANDEZ. Any other thing you would like to say in regard to that, whether it was error the way we handled it? We think it was not at this time, but if you have anything further to present, or if you would like to present any testimony at this time that you would have presented had you wanted to do so in your defendant's case, so that we could have had another look at that, we would be glad to listen to it at this time to determine whether, whether there was anything that you could have testified to that would have done away with the, what we thought was the (p. 8) Government's preponderance of the evidence that a conspiracy existed.

With that background, I am ready to hear any argument anyone would like to make about the points, the points you are making on motion for new trial.

MR. HUMPAGE: What I have as far as any evidence at this point comes, it is a little belated, and the jury has already returned the verdict. Of course the court has already made the determination of the existence of the conspiracy. Our position is set forth in the motion. This matter was broached on our motion for pretrial determination and again on our renewed motion for pretrial determination. So I don't think we have got into the position of a waiver, at least if GOMEZ is still in the Tenth Circuit. We have notified the court of our position.

In fact, in all deference to the court, a situation that came to pass at the time the court entertained the defendants' renewed motion for a pretrial hearing when we specifically addressed Rule 103 and 104, and defendants' desire to be heard on this matter out of the presence of the jury, the court as I recall indicated that this was a first impression, or the first time that the matter had been broached to the court. And the court further indicated the court would (p. 9) reckon with the request at the proper time.

Now during the course of the trial the court made a ruling that of course the conspiracy existed. That sort of foreclosed the need for the defendants to go forward with any additional evidence because the jury – I assume the court could have maybe vacated the court's ruling in relation to the conspiracy's existence and determine the issue out of the presence of the jury allowing the defendants to testify in that regard. However, the situation was I feel, in all deference to the court, we had done everything we could in attempting to obtain a pretrial hearing, and of course the matter was resolved by the court in both instances, unfavorably to the defendants with the caveat by the court that of course if we direct it at the appropriate time. So that is our position concerning, concerning our position – that is our position under Rule 103 and 104.

THE COURT: All right. Any further comments from the other attorneys?

MR. RORK: Your Honor, the defendant Waggoner would join in the remarks by Mr. Humpage.

MR. AMBROSIO: I have been joining in everything else. I will join in that also.

THE COURT: Of course the court has no idea now

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(p. 11) determinations prior to allowing the co-conspirators' hearsay statements to be heard by the jury, and we think this is still the law as far as we can find out.

Mr. Shernuk, you want to say anything more on this as to whether you think we have committed error, and you want to do something about it?

MR. SHERNUK: The government certainly doesn't believe any error was committed. The court's followed the standard procedure of the Tenth Circuit, and I don't really think we have anything else to say. We have hashed through this a number of times.

THE COURT: Two motions then, motion for the new trial, renewed motion for a judgment of acquittal, and I have already overruled the motion challenging the constitutionality of the sentencing guidelines. So I think in your motion for judgment of acquittal, you argue at that time evidence was insufficient to support a jury verdict, and a motion for judgment of acquittal should be denied if any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt, and that's UNITED STATES VERSUS TROUTMAN, 814 Fed. 2d 1428, the Tenth Circuit 1987. And I believe at this time I have to view the evidence in the light most favorable to the government, and I believe the evidence supports the jury's verdict.

(p. 12) I would have to say that the, there may be, the evidence was not strong in regard to defendant Martin, but apparently the jury thought that it was sufficient, and

I thought it was sufficient to go to a jury, and a jury found that he had participated.

So what I am going to do, I am going to overrule and – as far as all defendants are concerned, I am going to overrule and deny the motion for new trial. I am going to overrule and deny the renewed motion for a judgment of acquittal, and I have already overruled the motion challenging the constitutionality of the sentencing guidelines.

I think with that, we are probably ready to proceed to sentencing in this case. We will take these one at a time, and proceed under the guideline sentencings here, so let's take Mr. Evans first I think on this case. Mr. Ambrosio, you and Mr. Evans might come forward, and stand there at the podium.

SENTENCINGS

THE COURT: All right. I need to ask both of you gentlemen whether you have reviewed the pre-sentence reports including any revisions that may have been made after the initial disclosure, and whether there is anything you want to tell me about the pre-sentence

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